MOHD. GHAFAR OTHMAN

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, SEREMBAN
MUSTAPHA HUSSAIN J
[CRIMINAL APPEAL NO. 99 OF 1985]
28 AUGUST 1986

CRIMINAL LAW AND PROCEDURE: *Appellant jointly charged in Magistrate's Court with two others with offence of committing extortion under s. 384 of Penal Code read with s. 34 - Appellant convicted and sentenced to 6 months' imprisonment - Appeal - Statutory presumption - Onus on defence - Whether the defence had raised or created a reasonable doubt on the prosecution case - Appeal allowed - Whether there should be a re-trial.*

The appellant, a police inspector, was jointly charged in the Magistrate's Court, Seremban, with two others, 2nd accused (a detective police constable) and 3rd accused (a car re-possessor), with the offence of committing extortion under s. 384 of the Penal Code read with s. 34 of the same Code. At the close of the case for the prosecution, the learned Magistrate acquitted and discharged the 2nd accused and called upon the appellant and the 3rd accused to enter their defence.

At the end of the trial, the learned Magistrate found both the appellant and the 3rd accused guilty of the offence with which they were charged and convicted and sentenced each of them to six months' imprisonment.

The appellant (1st accused) appealed against the conviction and sentence while the 3rd accused did not appeal and presumably had already served his sentence, and on the other hand the prosecution did not appeal against the acquittal and discharge of the 2nd accused.

Held:

[1] There was no statutory presumption in this case. Even if there was a statutory presumption, the trial Court had to find on the evidence after evaluating and considering the defence and prosecution case in the light of the defence, if the defence had or had not rebutted the presumption on the balance of probabilities. And at the end of it all, the Court, irrespective of whether the case involved a statutory presumption or not, had to state that it had found that the defence had not raised or created a reasonable doubt on the truth of the prosecution case.

[2] The onus on the defence in this case was clearly to raise or create a reasonable doubt on the prosecution case as laid down by the celebrated case of *Mat v. PP* [1963] 29 MLJ 263, which has been accepted and followed by all our Courts and indeed cited with approval by our Supreme Court. It was very clear that there had been a grave error of law on the part of the Court below in this case.

[3] The Court allowed this appeal. The Court also considered whether to order a re-trial as the faults lie not with the prosecution. However, as the case was quite old and the 3rd accused had not appealed and had served his sentence, it would not be justified to have this case re-tried.

[Appeal allowed. Conviction and sentence quashed.]

Cases referred to:
Mukunan v. PP Supreme Court Criminal Appln. No. 2/86
Mat v. PP [1963] 29 MLJ 263

Legislation referred to:
Penal Code, ss. 34, 384

For the appellant - Christopher Fernando and S. Seeralan
For the respondent/public prosecutor - Mohd. Zaki bin Mohd. Yasin, DPP

JUDGMENT

Mustapha Hussian J:

The appellant Mohd. Ghafar bin Othman, a police inspector, was jointly charged in the Magistrate's Court, Seremban, with two others, namely, one Mohd. Razib bin Ibrahim, a detective police constable (2nd accused) and one Chan Tiow Long @ Malai Chan, a car re-possessor (3rd accused), with the offence of committing extortion under s. 384 of the Penal Code read with s. 34 of the said Code. The charge read as follows:-

> That you jointly on 21 December 1983 at about 6.10 p.m. at house No. 332, Jalan Loop, Seremban, in the District of Seremban, in the State of Negeri Sembilan, in furtherance of the common intention of you all, committed extortion by putting one Teh Kah Wai in fear of certain injury, to wit, you threatened to put him under arrest and thereby dishonestly induced the said Teh Kah Wai to deliver to you certain property, to wit, a cash cheque bearing serial No. 006850 for RM1,200 drawn on Pacific Bank, Seremban, and that you have thereby committed an offence punishable under s. 384 of the Penal Code to be read with s. 34 of the said Code.

In the Court below the learned Deputy Public Prosecutor conducted the prosecution while Mr. S. Seeralan appeared for the 1st accused (appellant) and 3rd accused, and Mr. Antony Fernandez defended the 2nd accused. At the close of the case for the prosecution, the learned Magistrate acquitted and discharged the 2nd accused and called upon the 1st and 3rd accused to enter their defence.

At the end of the trial, the learned Magistrate found both the appellant and the 3rd accused guilty of the offence with which they were charged and convicted and sentenced each of them to six months' imprisonment.

The appellant (1st accused) appealed against the conviction and sentence while the 3rd accused did not appeal and presumably has already served his sentence, and on the other hand the Deputy Public Prosecutor did not appeal against the acquittal and discharge of the 2nd accused.

Mr. Christopher Fernando with Mr. S. Seeralan argued the appeal in this Court while the learned Deputy Public Prosecutor appeared and argued for the Respondent. After hearing the very able submissions of both learned Counsel for the appellant and the learned DPP, the Court adjourned to carefully consider the points raised during the arguments before coming to a decision.

To start with, it is to be observed that the whole record of appeal is riddled with numerous spelling mistakes, grammatical errors and unfilled blanks which sometimes do not make any sense at all. Perhaps it may not be out of place to remark that before compiling the record of appeal, the notes of evidence should be checked and corrections made where necessary. The same applies to the grounds of judgment.

Coming to the appeal proper. The gist of the charge is that the three accused persons in furtherance of their common intention committed extortion by threatening one Teh Kah Wai to **put him under arrest** and thereby dishonestly induced the said Teh Kah Wai to deliver to them a cash cheque for RM1,200.

On that day in question i.e., 21 December 1983, the appellant was on leave. The 2nd accused, a police detective working with the appellant in the Anti-Dadah section of the Negeri Sembilan Police, was also on leave. At about 5 p.m. or thereabouts, the appellant had gone to the Seremban market to do his week's marketing and had met the 2nd accused who too, had gone there for marketing. Appellant had his car but the 2nd accused had no transport and he had asked the appellant for a lift to the bus stand. On their way along Jalan Lemon, they were flagged down by the 3rd accused, a car re-possessor whose car had broken down. Appellant stopped his car and gave a lift to this Chinese, the 3rd accused. According to the appellant, the 3rd accused was his informer. In the car, the 3rd accused said that he was on his way to re-possess a car and showed a letter of authority to this effect (Exhibit P 4). The 3rd accused had asked the appellant to drive him to the address of the complainant at Jalan Loop to re-possess the car, to which the appellant readily agreed, something of a very rare quality nowadays for the police to do even to the extent of both appellant and 2nd accused forgetting about the bus stand.

At the complainant's house at Jalan Loop, the 3rd accused approached the complainant (PW1) and showed him the letter to re-possess. There was some discussion (in Chinese). The complainant who was staying in Seremban had bought the car from Batu Pahat about one year before, had paid only the first payment of RM7,500 and he had not paid the monthly instalment of RM641 at all for the past one year or so. Complainant wanted to keep the car badly and some bargaining as to the payment and some haggling as to how much had to be paid for the 3rd accused not to take away the car, did take place. The discussion then became heated. The evidence of the complainant (PW1) is not clear at what point of time the appellant had gone to his car to take a pair of handcuffs and had handcuffed the complainant. The complainant then agreed to pay RM1,200 after he was handcuffed. Complainant had said that he also telephoned his boss (PW3) calling him to his house for financial help. The complainant said the handcuffing was done when his boss (PW3) had arrived. There was then, some doubt as to when the handcuffing took place before or after the complainant telephoned his employer (PW3) asking him for financial help. PW3 in his evidence stated that he did not see the appellant doing anything and that he did not see the handcuffs. The DPP had then applied to the Court to impeach PW3's evidence. After being shown the relevant part of his statement, PW3 said he then remembered about the handcuffs, but nothing to the effect whether the appellant indeed had handcuffed the complainant. PW3 simply said he remembered about the handcuffs and that's all. The learned Magistrate then reserved the ruling on the application of the learned DPP till the end of the trial, presumably whether to impeach the credit of PW3 or not. Incidentally, the learned Magistrate did not make any ruling at all at the end of the trial. Both Counsel for 1st and 3rd accused and the DPP as officers of the Court, had forgotten to remind the learned Magistrate about this reserved ruling, they had been carried away.

This aspect of handcuffing the complainant was strenuously denied by both the appellant and the 3rd accused in their defence and the 2nd accused as witness for the defence. The handcuffs were not officially issued handcuffs and were not produced in Court as an exhibit, although there was evidence that the appellant had a pair of his own previously which had been lost.

The complainant (PW1) in his testimony had not been consistent with his evidence. From the record, he had stated when he was handcuffed he was frightened and he agreed to pay the RM1,200. Under cross-examination, the complainant had said that he believed that if he paid the RM1,200 he would be able to retain the car. He had also agreed there was no immediate treat. Complainant also agreed that none of the three accused had said that if he did not pay the RM1,200 he would be arrested. This piece of the evidence is found on p. 15 of the record and it goes to the root of the charge itself. Complainant again had said (still on p. 15, 8th line from bottom) "I confirm that whatever money I paid is not on threat of arrest." Pausing here awhile. Let's look at the charge. What was the act in the charge that induced the payment? This contradictory piece of evidence which goes to the root of the charge itself had not been considered at all by the learned Magistrate.

We do not know which part of the complainant's evidence has been rejected and which has been accepted by the Court. Perhaps the charge should have been amended.

One of the ingredients of the charge of extortion is to **"dishonestly induce"** to delivering the property or valuable security etc. To tack the criminality of common intention of s. 34 of the Penal Code onto the three accuseds, the learned Magistrate must refer to the salient evidence from which the inference of common intention can be drawn. The learned Magistrate had not made any reference to which part of the evidence from which such inference had been adduced.

The letter of authority to re-possess (Exhibit P 4) was shown to the appellant and the 2nd accused in the car. This letter as demonstrated in Court had the name of the 3rd accused and his identity card number and a new amount typed on top of the original name, identity card number and figure without authority. This forgery could only be seen if one looked at the back with the letter placed against a lighted background. Could the appellant while in the car at the wheel be said to be aware of this forgery?

But if appellant and also the 2nd accused (whose defence was not called) had not been aware of this forgery, then if they had accompanied and even had handcuffed the complainant, they could not be said to have embarked on a mission of dishonesty. After all at a glance, the letter had the name and particulars of the 3rd accused authorising the 3rd accused to re-possess the car.

It is glaring from the record, that this element of "dishonestly inducing" had not been considered at all.

At the close of the prosecution case, when the learned Magistrate held that there was a *prima facie* case against the appellant and the 3rd accused, presumably the learned Magistrate had found there was common intention. But then the 2nd accused was acquitted and discharged without his defence being called just because he did nothing. If there was common intention, then all the three accuseds' defence should have been called. After all one can participate in the pre-arranged plan by just standing or keeping a look out or by being present at the scene of the crime to lend weight by numbers. One can also participate by just standing or sitting quietly, just like the extras in a film or in a play. In any event, there is a total absence of such evaluation of evidence to infer such a pre-arranged plan to handcuff the complainant, or to put him under threat of arrest.

Unfortunately, this Court has not been endowed with occult power and therefore cannot fathom the reasoning of the Court below and is only left with guesswork.

On the point of the trial Court not making any ruling on the application of learned DPP to impeach the credit of PW3, this clearly shows the learned Magistrate had not carefully considered the evidence as a whole. If one can overlook this important point in the evidence, it cannot be said that one had fully considered the whole evidence, or even read it before deciding.

Finally, to cap it all, the Court below used the wrong test of the onus of proof by the defence. The record stated, to quote, **"I come to the decision that both 1st and 3rd accused has (sic) failed to rebut the** *prima facie* **case that has been made up by the prosecution and found them guilty and convicted them as charge under s. 384 of the Penal Code".**

The words used are **"rebut the** *prima facie* **case".**

There is no statutory presumption in this case. Even if there is a statutory presumption, the trial Court had to find on the evidence after evaluating and considering the defence and prosecution case in the light of the defence, if the defence had or had not rebutted the presumption on the balance of probabilities. And at the end of it all, the Court, irrespective of whether the case involved a statutory presumption or not, had to state that it had found that the defence had not raised or created a reasonable doubt on the truth of the prosecution case. (See Supreme Court case of *Mukunan v. PP* Supreme Court Criminal Appln. No. 2/86).

The onus on the defence in this case is clearly to raise or create a reasonable doubt on the prosecution case as laid down by the celebrated case of *Mat v. PP* [1963] 29 MLJ 263 which has been accepted and followed by all our Courts and indeed cited with approval by our Supreme Court.

To sum it all up, it is very clear that there has been a grave error of law on the part of the Court below in this case.

It is without hesitation, that this Court will, as will any appellate Court, allow this appeal. I have also considered whether to order a re-trial as the faults lie not with the prosecution. However, as the case is quite old and the 3rd accused had not appealed and had served his sentence, it would not be justified to have this case re-tried.

Accordingly, the appeal is allowed. The conviction and sentence are quashed.

Also found at [1986] 2 CLJ 257